No. _____ (1)

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In The
Supreme Court of the United States

ROBERT CHARLES JOHNSTON,

Petitioner,

v.

NORTH CAROLINA ATTORNEY GENERAL; STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

I. Whether a bookstore clerk who sells two allegedly obscene magazines may be convicted consistent with the First Amendment where the jury is instructed in such a way that neither magazine separately has to be found obscene by the jury?

II. Whether the court below erred in concluding that, under 28 U.S.C. §2254, a state court's decision to deny a federal constitutional claim cannot involve "an unreasonable application of" clearly established Federal law as determined by the Court unless the state court's decision is predicated on an interpretation or application of relevant precedent that "reasonable jurists would all agree is unreasonable"?

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OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1-2) is unpublished. The district court entered a Judgment and Memorandum Opinion dismissing Petitioner's Petition for Writ of Habeas Corpus on September 2, 1998. (App. 3-14).

This matter has also been before state courts. Petitioner was convicted of dissemination of obscenity on June 2, 1995, Lee County Superior Court file No. 93-CRS-10752. The North Carolina Court of Appeals affirmed the conviction on August 6, 1996, but remanded the case for resentencing. 123 N.C.App. 292, 473 S.E.23d 25 (1996). Petitioner appealed to the North Carolina Supreme Court, which dismissed the appeal and denied his motion for discretionary review, on November 7, 1996. 344 N.C. 737, 478 S.E.2d 10 (1996). Petitioner then filed his Petition for Writ of Habeas Corpus in the U.S. District Court for the Middle District of North Carolina on November 6, 1997, which was dismissed on September 2, 1998. Petitioner appealed to the United States Court of Appeals for the Fourth Circuit on October 1, 1998. The appeal was dismissed on May 13, 1999, on a finding by the Fourth Circuit of "no reversible error in the district court's opinion."

No other petition or court action seeking habeas corpus review has been filed other than the one herein involved.

JURISDICTIONAL STATEMENT

The final judgment of the court of appeals was entered on May 13, 1999. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides in pertinent part: "Congress shall make no law...abridging the freedom of speech or of the press...."

The Fourteenth Amendment, section one, provides in pertinent part: "[N]or shall any State deprive any person of...liberty... without due process of law;...."

STATEMENT OF THE CASE

The state indictment alleged that Petitioner Robert Charles Johnston intentionally disseminated obscenity "by selling to Kevin Gray at the Sanford Video and News Book Store...a magazine entitled 'Eric & Johns Big Tit - 3-Way' and a magazine entitled 'The Very Best of High Society." Such charge is a felony under North Carolina law.

Detective Gray testified as the sole witness at the jury trial in Lee County (N.C.) Superior Court. He went to Sanford Video & News about 8 p.m. on September 23, 1993. He was wearing plain clothes. The detective saw Mr. Johnston behind a counter in the store where the cash register was situated. Mr. Gray selected two video tapes and two magazines. Both magazines were wrapped individually in a clear cellophane wrapper. Mr. Gray took the magazines to the counter, and Mr. Johnston rang them up. The witness did not have any conversation with Mr. Johnston that he can remember. Mr. Gray paid $10.00 for one magazine; $5.95 for the other; he then left the store. The magazines marked State's Exhibits 2 and 3 at trial are the magazines Mr. Gray purchased on September 23, 1993. State's Exhibit No. 2 is entitled "Eric & John's Big Tit - Three-Way" and Exhibit No. 3 is "The very Best of High Society." Mr. Gray identified Mr. Johnston at trial as the person who sold him the two magazines on September 23, 1993.

Detective Gray testified on cross-examination that Mr. Johnston is not the owner of the store and the manager in 1993 was an individual named Eva Russell. On no other occasion that Mr. Gray was in the store had Mr. Johnston been there. Both magazines in question were in sealed clear cellophane wrappers which the witness had to break open; each wrapper was tightly around the magazine so that one could not see the pages inside. There were non-sexual books and magazines for sale at the store. No one instructed Detective Gray how to determine whether there was legally obscene material among the sexually explicit material at the store. He was given $125.00 and told to purchase material. He "just picked items off the shelf. I bought other things besides magazines, and I just picked items off the shelf and purchased it." As for the magazines, he could only look at the front and back covers. Mr. Johnston did not do anything while the witness was in the store that clerks at a store like the Pantry would not do in terms of waiting on him as a customer. Mr. Johnston could not look at the inside pages of the purchased magazines because of the heat- sealed wrapping.

With the one witness the State rested. The witness did not testify concerning community standards in Lee County, N.C., from which the jury pool was drawn and of which Sanford is the county seat. Defendant moved that the case against him be dismissed for insufficiency of the evidence. The trial court denied the motion to dismiss. The Defendant offered no evidence, and renewed his motion to dismiss, which motion was again denied.

The trial judge, over the Defendant's objections, told the jury that if it was found beyond a reasonable doubt that "the defendant intentionally disseminated material by selling a magazine or magazines and that the defendant knew the nature and contents of the material, it would be your duty to return a verdict of guilty of disseminating obscenity intentionally." The trial judge, at the urging of the State,

expressly refused to require that the jurors unanimously agree at least one specific magazine was obscene. The jury convicted the Defendant, unanimously finding Mr. Johnston "guilty of dissemination of obscenity," without reference to either or both magazines. The trial judge then sentenced the Defendant as a Class I felon, even though on the date of the alleged offense, dissemination of obscenity was a Class J felony. The Defendant appealed as of right to the North Carolina Court of Appeals, giving notice of appeal in open court. Mr. Johnston then exhausted his state appellate remedies.

SUMMARY OF THE ARGUMENT

The conviction of Petitioner in state court was unreliable because the lower court judge's instructions provided for conviction of the accused for dissemination of obscenity without an instruction to the jury to make a proper finding that at least one of the magazines named in the indictment was actually obscene. The conviction is also unreliable because the Fourth Circuit's standard for habeas review relief, applied by the district court and upheld on appeal, is erroneous.

These matters raise serious federal constitutional issues. The conviction of Petitioner for distributing obscene magazines without a factual determination that at least one of the magazines is actually obscene is a violation of Petitioner's rights under the First and Fourteenth Amendments and the requirements established in Miller v. California. The standard for habeas review applied by the Fourth Circuit that "habeas relief is authorized only when state court adjudicated federal constitutional claim in a manner that reasonable jurists would **all** agree is unreasonable" (emphasis added) is too strict and effectively alleviates the federal judiciary of their duty in a habeas proceeding to review the state's interpretation of the federal

Constitution. Taken to its logical end, this standard makes habeas relief virtually impossible.

REASONS FOR GRANTING THE WRIT

I. THE JURY WAS NOT INSTRUCTED THAT TO CONVICT PETITIONER, IT HAD TO FIND THAT AT LEAST ONE MAGAZINE WAS OBSCENE AND PETITIONER HERE COULD HAVE BEEN CONVICTED WITHOUT EITHER MAGAZINE'S BEING FOUND OBSCENE

The decisions below stand for the proposition that a defendant indicted for the felony of disseminating obscenity for disseminating multiple magazines may be found guilty without a jury having to find as an essential element that at least one magazine is obscene. Thus, the holdings below would allow a defendant charged with selling 12 allegedly obscene magazines to be convicted where a different juror each finds a different magazine to be obscene. Therefore, the defendant can be convicted even though none of the 12 magazines has been found obscene by the requisite number of jurors (in North Carolina, by 12 jurors).

This case, therefore, involves decisions by the courts below that denigrate the protections of the First Amendment and are in conflict with the previous First Amendment jurisprudence of this Court.

The state court indictment charged Petitioner with disseminating obscenity by the sale of "a magazine entitled 'Eric & Johns Big Tit - 3-Way' **and** a magazine entitled 'The Very Best of High Society'." (Underline in indictment; emphasis added). (The indictment appears at page 2 of the Record on Appeal in the North Carolina Court of Appeals, which Record is a part of the District Court file--shown at Docket Entry No. 6.)

Petitioner in writing requested submission of the following jury instruction: "You may not convict defendant unless you unanimously agree that the State has proven all the elements of the offense beyond a reasonable doubt as to a given magazine. It is not enough that some of you may find one magazine obscene, while others find another magazine obscene..." (emphasis added). (The proposed instruction appears at page 34 of the Record on Appeal in the North Carolina Court of Appeals, which Record is a part of the District Court file--shown at Docket Entry No. 6.)

In his Memorandum Opinion, the magistrate judge finds that the state court judge declined to give the requested instruction, "finding no material difference between the two magazines." (Mem. Op. p. 3)(App. 5).

The instruction given by the state court judge to the jury was: "In determining whether certain material is obscene, you should consider the entire magazine or magazines as a whole..." (emphasis added). (The instruction appears in Trial Transcript Vol. III at page 212, which Transcript is a part of the District Court file--shown at Docket Entry No. 6.)

The jury convicted, unanimously finding Mr. Johnston "guilty of dissemination of obscenity," without reference to either or both magazines. (The verdict sheet appears at page 35 of the Record on Appeal in the North Carolina Court of Appeals, which Record is a part of the District Court file--shown at Docket Entry No. 6.) On direct appeal, the North Carolina Court of Appeals held that the trial judge was merely instructing the jury disjunctively as to various alternative acts which would establish an element of the offense. The flaw in the state appellate court's reasoning in its published opinion is that the sale of neither magazine establishes the offense unless at least one of the two magazines is obscene.

The magistrate judge, upheld with no written analysis by the Fourth Circuit, found two reasons for rejecting

Petitioner's first ground (the one raised in this Court) for habeas relief: (1) the decision of the Court of Appeals was a "reasonable adjudication" of this issue under Green v. French, 143 F.3d 864 (4th Cir. 1998), and (2) even if erroneous, the state judge's instruction was harmless error because the judge "found as a fact that there was no material difference in content between the two magazines insofar as the question of obscenity was concerned." (Mem. Op. p. 6)(App. 10). (The observation by the trial judge as to his personal opinion of the magazines appears in Trial Transcript Vol. III at page 158 lines 21-23, which Transcript is a part of the District Court file--shown at Docket Entry No. 6.) The trial judge stated in denying Petitioner's motion to instruct the jury that it had to unanimously find at least one magazine obscene in order to convict: "Well, the Court reviewed both of the magazines, and the Court found no difference in the content of either magazines."

In the case at bar, there are six decisions by this Court on point and which must be followed as controlling: Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); Fort Wayne Books v. Indiana, 489 U.S. 46, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989), Yates v. U.S., 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957) (overruled in part on other grds., Burks v. U.S., 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)); Cramer v. U.S., 325 U.S.1, 65 S.Ct. 918 (1945); Williams v. North Carolina, 317 U.S. 287, 65 S.Ct. 207 (1942); and Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).

Miller, supra, is the controlling authority for the principle that before any magazine (or other work) may be found obscene, the First Amendment requires each work (whether a book, film, magazine, recording or whatever), to be taken as a whole on its own merits or demerits and to have all three prongs of the test laid down in Miller applied to it separately and as a whole.

The latter five cases, supra, are the controlling Court authority for the principle that it is a violation of the due process clause for a conviction to be upheld where the jury could have convicted on an unsupportable ground, even if there is a supportable ground on which the conviction could be based, where it is not possible to tell which ground the jury selected.

The state court decisions below are in square conflict with Miller and Stromberg and its progeny. The magistrate judge and the Fourth Circuit should have analyzed the state court decisions under the "contrary to" clause of 28 U.S.C. §2254(d)(1). But the magistrate judge's "unreasonable application" analysis is wrong, and should not have been upheld by the Fourth Circuit, assuming, arguendo, it is the correct test to apply.

The magistrate judge prefaces his analysis of the "unreasonable application" test with a reference to the state trial judge's finding of "no material difference between the two magazines." (Mem. Op. p.3) (App. 5). Yet nowhere in the opinion of the North Carolina Court of Appeals does it mention this "finding" of the trial judge --for the simple reason that a finding of fact as to the content and nature of each of the magazines is strictly a function for the jury under North Carolina law; the state judge's decision to reject the requested written instruction for a unanimous decision on at least one magazine was based upon that judge's unlawful invasion of the province of the jury as sole fact finders in a criminal prosecution in North Carolina.

The North Carolina Court of Appeals knew better than to base its decision even in part on the "finding" by the trial judge; therefore, that court cited as authority for its rejection of Mr. Johnston's argument the case of State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990), an indecent liberties prosecution wherein the jury instructions did not set forth specific touchings, only the general terms of "immoral, improper, or indecent touching or act" by the defendant on

the child. The case at bar has only a superficial similarity to Hartness, but--as a matter of federal constitutional law--cannot be analogous. While it is true that only one criminal charge of dissemination may be brought under North Carolina law upon each purchase, regardless of the number of allegedly obscene items purchased, the indictment must list the specific item or items contended to be obscene. In an indecent liberties case, there are no constitutional protections of any improper touching or other indecent liberty with a child. But the First Amendment protects sexually explicit material which does not meet the definition of obscenity. The key point is this: unless a jury, applying the Miller test, finds a magazine to be obscene, it is not a crime to have sold it, no matter how sexually explicit it is. It is not a crime to have sold two magazines when some jurors think one is obscene and the rest think the other is but not all 12 find at least one to be obscene. (Under North Carolina law, there must be a unanimous agreement by the jury on every essential element of the crime. See State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).) Yet all of the courts below now permit a defendant to be found guilty of disseminating obscenity although the jury does not as an essential element find at least one work to be obscene. This is in clear derogation of the First Amendment.

On this issue, the state Court of Appeals does not distinguish or apply or mention at all Miller and the Stromberg line of cases, although in his Brief in the Court of Appeals, Mr. Johnston relied on both as the constitutional beacons. It cannot be reasonable for the North Carolina Court of Appeals to fail to consider this Court's precedents of Miller and Stromberg and its progeny.

In the case at bar, dissemination of material is not a crime unless that material is first proven to be obscene. A conviction in which the jury is allowed to pick one part of one magazine and another part of another magazine and combine them to find that the materials taken together are

obscene leaves the defendant--and the public--without any guidance as to what conduct was in fact illegal. Such a conviction offends the First Amendment because it may induce citizens to refrain from exercising their constitutionally protected rights for fear of criminal sanctions, thus "chilling" expression. New York v. Ferber, 458 U.S. 747, 768, 102 S.Ct. 3348, 3360-61, 73 L.Ed.2d 1113, 1129-30 (1982). Oddly, under the approach endorsed by the North Carolina Court of Appeals and upheld by the federal courts below, if Petitioner sold either magazine by itself, he could escape conviction, but by selling them in that particular combination, he becomes guilty of disseminating obscenity.

The substantial constitutional issue in this case is not properly analyzed under Hartness, supra, but by this Court's decisions cited above and by Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989), which makes clear that a specific material must be found to be obscene in an adversarial proceeding before sanctions may issue; for otherwise the First Amendment is violated. Fort Wayne Books clearly sets forth the principle that a material is presumed to be protected expression until a determination of obscenity after an adversarial process has occurred. Without a determination that a particular piece of material is obscene, the presumption as to that work has never been rebutted. Under North Carolina criminal procedure, where a defendant, as here, pleads not guilty to a felony, a jury must unanimously agree that the defendant committed each essential element of the charged offense. Majority verdicts are not permitted, and the unanimity must be by 12 jurors--neither more nor less. See State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975); State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971). Thus, in the instant case, the jury would have to find unanimously at least one of the materials obscene under the Miller test for the Petitioner to be constitutionally convicted. If a jury does not first

unanimously find that a material is obscene, a defendant cannot be guilty of disseminating obscenity when he distributed that material--the defendant simply disseminated protected expression. For these reasons, cases such as Hartness permitting disjunctive jury instructions are inapplicable to Petitioner's case and cannot possibly be reasonably applied to his case given the dictates of the First Amendment.

In reciting the state judge's finding "as a fact" that there was no material difference between the two magazines at issue, the magistrate judge erroneously takes the position that the state judge's finding is presumed correct. Such "finding" is not one of historical fact, and is not one which depends upon assessment of the credibility of witnesses. It is thus not "a determination of a factual issue" under 28 U.S.C. §2254(e)(1), nor is it entitled to any presumption of correctness under §2254(d). Finding a given magazine to be obscene or not is a mixed question of fact and law and, as held in Miller v. California, supra, is indeed a finding peculiarly suited to a jury to make under proper instructions as articulated in Miller. This is because the first two prongs of the Miller test involve an application of community standards to the work alleged to be obscene when it is considered as a whole.

Where the inquiry before a court involves application of the controlling legal standard to facts, then state court findings are not entitled to any presumption of correctness. See Thompson v. Keohane, 516 U.S. 99, 116 S.Ct. 457, 133 L.Ed.2d. 383 (1995). Here, Miller sets out the controlling legal test or standard, and it and Fort Wayne Books require because the First Amendment is implicated that the test be applied to the four corners of a given magazine before that magazine may be considered obscene.

Indeed, the fundamental, core issue involved in Petitioner's first contention is that the jury was not given adequate instructions to fulfill its role of applying the

constitutionally required legal principles to each magazine separately.

Even if the trial judge "found no difference in the content of either magazine" (Tr Vol.III, p 158, ll.22-23), individual jurors could reasonably have found differences when applying the Miller v. California, supra, test. Thus, assuming, arguendo, the state trial judge could properly invade the province of the jury and make such a "finding," such decision by him was based upon an unreasonable determination of the facts in light of the evidence of the contents of the magazines. 28 U.S.C. §2254(d)(2). **The question is not how the state trial judge--or even the federal magistrate judge--viewed the materials. For the failure to properly instruct the jury to be harmless error, the state trial judge and the federal magistrate judge would have to conclude that no rational juror could find any difference in the magazines when each is viewed separately as a whole and the Miller tests are applied to each as a whole. If any rational juror could find a difference in the magazines under the Miller test, then the failure to instruct complained of is not and cannot possibly be harmless error.**

An examination of each magazine, in the record below as sealed exhibits, reflects some substantial differences. For example, State's Exhibit 2, titled "Eric & Johns Big Tit - 3-Way" contains very few written words, and the words it does contain have a very intellectually limited motif. There are also photographs of actual oral and vaginal penetration of a female by two males. This magazine contains two pictures of what appears to be seminal fluid which has been ejaculated onto the face of the female. In contrast, State's Exhibit 3 entitled, "The Very Best of High Society," while probably containing less written words percentage-wise, does contain a substantial prose article entitled, "The Wrong Man," by Gary Burdick, which has absolutely nothing to do with anything sexual. In addition,

the latter magazine does not contain any photographs of actual oral or vaginal penetration or other ultimate sex acts; on the other hand, it does contain a number of photographs of women simulating lesbian activities. Where heterosexual activities are depicted, they involve one-on-one and not a threesome. At least one photograph in the latter magazine, with the words "SexFarm Woman" appearing across the top suggests violence in that it depicts a woman, nude from the waist up, who appears to have a rope below her breasts and who displays heavy bruising on her left arm and left naked breast.

The magazines are thus very different, and a reasonable juror could find Exhibit 3 to be obscene within the community's standards by depicting the bruises of violent sex against women and a large amount of lesbian sex even though the magazine contains an article which clearly has political and/or literary merit and even though the magazine does not contain any actual penetration or other ultimate sex acts of any kind; but because the magazine does not depict explicit penetration, because it does have a substantially well-written prose article having nothing whatsoever to do with sex, and because it does not involve group sex, other jurors may well have rationally concluded that in their opinion this magazine is not obscene within the community standard. Jurors so concluding might, on the other hand, have found Exhibit 2 to be obscene because it appears to have no prose of political or literary merit, shows actual vaginal and oral penetration, shows ejaculated seminal fluid, and shows a trio (two men and a woman) engaged in explicit sexual activities. But other jurors who thought Exhibit 3 obscene because of its depictions of lesbian sex and/or violence may have thought No. 2 not obscene because it involved purely consensual heterosexual activities without any signs of force or violence.

Because of the above elements, there is simply no rational way a judge or appellate court can conclude that

both magazines are substantially the same and both fail the Lee County community standard, nor is there any rational way for a judge or appellate court to conclude that one magazine clearly meets the community standard while the other one does not. This is a fact-finding function solely for the jury applying the Miller tests under proper instructions.

Beyond that, because each magazine is presumptively protected free speech unless and until a jury unanimously finds it to be obscene, the possibility of the non-unanimous verdict as to a given magazine involved in this case cannot ever be said to be harmless beyond a reasonable doubt. Consequently, the Petitioner is clearly entitled to a new trial, with the jury properly instructed substantially in accordance with the requested jury instruction set out at the State R p 34. See also State R p 23, where Mr. Johnston requested and the trial court refused an instruction, inter alia: "In order to prove that the magazines are obscene, the State must prove each of these elements beyond a reasonable doubt. If you have a reasonable doubt as to any one of these things as to any magazine, you must find the defendant not guilty as to that magazine." (emphasis added).

The State throughout this litigation, beginning in the trial court, on direct appeal, and now in this habeas proceeding, has taken the firm--but constitutionally infirm--position that a jury in an obscenity case involving multiple works does not have to come to a unanimous conclusion that any given work is obscene in order to convict a person charged with disseminating obscenity. If this is indeed the law, then a defendant charged with disseminating 12 sexually explicit magazines in a single sale may be convicted of disseminating obscenity even though each given work is found to be obscene by only one juror--the defendant is guilty as long as every juror thinks some magazine obscene even though no more than one juror finds a given magazine obscene.

But the State's position is clearly contrary to law, and it is not a reasonable interpretation or application of Miller or any other Supreme Court First Amendment case. Indeed, the principle espoused by the State and adopted by all of the lower courts is a manifestly unreasonable application of clearly established Supreme Court First Amendment law for the reasons stated above. It is intolerable under the First Amendment for a defendant to be convicted for selling 12 magazines where only one juror finds any given magazine to be obscene. But unless this Court grants Petitioner relief, this unconstitutionally intolerable result is now the law in North Carolina and is permitted to be the law throughout the Fourth Circuit.

The State has correctly argued that a defendant may be convicted of a single crime by alternate acts so long as the jury is unanimously satisfied that the defendant is guilty of each essential element of that crime, although the jurors may not be unanimous as to each act of the defendant. But this proposition of law is inapplicable to the case at bar. The proposition would be applicable if, for example, the State contended Mr. Johnston sold or rented a given work alleged to be obscene to Mr. X, and all 12 jurors concluded that work to be obscene under the Miller test, but six jurors thought the transaction to be a sale while the other six thought it a rental. However, under clearly established First Amendment principles, before Mr. Johnston has committed any crime, an essential element of that crime is that at least one of the magazines be obscene. Since the obscenity of a work, taken as a whole, is essential for a constitutionally proper conviction, it follows that the jury must unanimously conclude at least one of the magazines was obscene under the tree prongs of Miller. Unless at least one of the two magazines disseminated by Mr. Johnston is obscene under Miller, he committed no crime. Indeed, he engaged in First Amendment protected activity.

But we do not know whether all 12 jurors found at least one of the works here at issue obscene. The trial court specifically rejected giving the jury a proffered jury instruction that it had to find unanimously at least one magazine to be obscene before it could convict. Indeed, the trial court deliberately instructed the jury in such a way that Mr. Johnston could be convicted of disseminating obscenity without the jury unanimously concluding at least one of the two magazines to be obscene.

The jury convicted the Defendant, unanimously finding him "guilty of dissemination of obscenity," without reference to either or both magazines.

Because Mr. Johnston may have been convicted when, instead of committing a felony, he was engaged in activity protected by the First Amendment, the jury instructions here at issue, and the failure to instruct as requested by the defendant, certainly rendered the trial and conviction fundamentally unfair, cannot be said to be harmless error, and entitles the defendant to a new trial. See, Stromberg, supra, and the other cases cited, supra, which follow it.

The effects of the conviction of Petitioner for disseminating obscene magazines, without a finding by the jury that the material is actually obscene, is a clear violation of the requirements under the First Amendment made applicable to the states through the Fourteenth Amendment. Because of the paramount importance of this issue, and the need to make it clear to all courts that such violations will not be tolerated, it is imperative that this court intervene and provide authoritative guidance by granting certiorari.

II. THE FOURTH CIRCUIT'S STANDARD FOR HABEAS REVIEW IS CONSTITUTIONALLY ERRONEOUS

The district court's and the Fourth Circuit's review of the state court decisions was according to the stated standard that "habeas relief is authorized only when the state court adjudicated federal constitutional claim in a manner that reasonable jurists would all agree is unreasonable." The application of this standard resulted in the affirmance of a conviction of Petitioner in clear violation of his First Amendment rights; see discussion, supra.

The duty of the federal courts is to interpret and decide questions of federal law. The standard applied by the courts below in habeas review effectively relieves them of this duty. The standard provides that the state court's action on a claim regarding the federal constitution is unreasonable only when decided "in a manner that all jurists would agree is unreasonable." This standard is unreasonable and erroneous. Included in the scope of "all jurists" are the state court judges who have affirmed the lower court decisions which allegedly were unreasonable applications of federal constitutional law. The Fourth Circuit admits that defining "unreasonable application of" has not been simple. "Upon reflection, however, it is evident that this appearance is deceptive and that the intended meaning of these terms is not so clear at all." Green v. French, 143 F.3d 865, 870 (4th Cir. 1998). Despite these difficulties, the Fourth Circuit has decided to come down on the side of deference to state judges instead of protection of individuals rights. The standard of review upheld by the Fourth Circuit in this case and followed by federal courts in the Fourth Circuit since Green is in conflict with the First Circuit in O'Brien v. Dubois, 145 F.3d 16 (1st Cir. 1998) (objective reasonableness standard to be applied by, inter alia, referring to federal court decisions in factually similar cases). The

Fourth Circuit's standard of review applied in this case by the lower courts also conflicts with the Seventh Circuit view. Hall v. Washington, 106 F.3d 742 (7th Cir.), cert. den. 118 S.Ct. 264 (1997) (state court's decision must stand only if result is one of severally equal plausible outcomes, but not where decision is at clear tension with Supreme Court precedents).

This issue is before this court in the case of Williams v. Taylor (No.98-8384), which is scheduled for oral arguments on October 4, 1999. Given the importance of this issue in the present case, both to serve as a protection of Petitioner's constitutional rights and to assure that federal judges make an actual review of the state court's action on constitutional issues, the petition for certiorari should be granted so that this case can be decided in accordance with the holding in Williams v. Taylor as to the standard of review.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari in this case.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-7465

ROBERT CHARLES JOHNSTON,
Petitioner - Appellant,

versus

NORTH CAROLINA ATTORNEY GENERAL;
STATE OF NORTH CAROLINA,
Respondents - Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. Paul Trevor Sharp, Magistrate Judge. (CA-97-1216-1)

Submitted: April 20, 1999
Decided: May 13, 1999
Entered: May 13, 1999

Before ERVIN, WILKINS, and MICHAEL, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Thomas Franklin Loflin, III, LOFLIN & LOFLIN, Durham, North Carolina, for Appellant. Clarence Joe DelForge, III, OFFICE OF THE ATTORNEY GENERAL OF NORTH CAROLINA, Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Robert Charles Johnston seeks to appeal the magistrate judge's order denying relief on his petition filed under 28 U.S.C.A. § 2254 (West 1994 & Supp. 1998). We have reviewed the record and the magistrate judge's opinion and find no reversible error. Accordingly, we deny a certificate of appealability and dismiss the appeal on the reasoning of the magistrate judge. See Johnston v. North Carolina Attorney Gen., No. CA-97-1216-1 (M.D.N.C. Sept. 2, 1998). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA

ROBERT CHARLES JOHNSTON,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

Entered: September 2, 1998

MEMORANDUM OPINION

SHARP, Magistrate Judge

Petitioner Robert Charles Johnston was convicted in 1995 in Lee County Superior Court, Honorable Knox V. Jenkins, judge presiding, of disseminating obscenity in violation of N.C. Gen. Stat. § 14-190.1. He was sentenced to two years suspended for three years with two years of supervised probation. On August 6, 1996, the North Carolina Court of Appeals found no error in Petitioner's trial and conviction, but remanded for resentencing. The Supreme Court of North Carolina dismissed Petitioner's appeal and denied discretionary review on November 7, 1996. *State v. Johnston*, 123 N.C. App. 292, 473 S.E.2d 25, *review denied*, 344 N.C. 737, 478 S.E.2d 10 (1996).

Petitioner's Habeas Corpus Claims

Petitioner contends that his federal constitutional rights have been violated because: (1) the trial judge's instruction allowing Petitioner to be convicted of disseminating obscenity without requiring the jury to

unanimously find at least one of the two magazines identified in the indictment to be obscene, violated the First and Fourteenth Amendments;[1] (2) the trial judge's instructions to the jury violated Petitioner's First and Fourteenth Amendment rights because the judge erred in defining "a prurient interest in sex"; and (3) the trial judge committed First Amendment error by requiring as a condition of Petitioner's probation that he not work or be employed in a retail establishment that sells sexually explicit material.

Exhaustion of State Court Remedies

The State concedes that Petitioner Johnston has raised the substance of his present claims in state court as required by 28 U.S.C. § 2254(b) (1) (A) (1996), and has thereby exhausted state remedies.

Statement of Facts

The North Carolina Court of Appeals summarized the facts of this case as follows.

> At trial, the State called Detective Sergeant Kevin Gray of the Sanford Police Department. Detective Gray testified that he was on duty on 28 September 1993 when he entered an adult establishment called the Sanford Video and News in order to purchase "sexually explicit materials." He described the store as containing hundreds of sexually explicit magazines and videos and various "sex toys." After entering the store, Detective Gray saw defendant behind the counter by the register. After about twenty minutes, the

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[1] The ACLU has filed an amicus brief on this issue.

> detective selected two magazines and bought them from defendant. Detective Gray testified that the magazines were wrapped individually in clear cellophane, providing a full view of the front and back of the magazines, but preventing the pages within from being seen.
>
> The magazines were admitted into evidence. On the front cover of State's Exhibit No. 3 is a profile view of two naked women touching each other. The front of State's Exhibit No. 2 displays frontal nudity of a female engaged in various simultaneous sexual acts with two protuberant males. On the reverse cover is a female engaged in fellatio.
>
> The defense did not present any witnesses.

123 N.C. App. at 295-96, 473 S.E.2d at 28.

Discussion

Claim (1) - the trial judge's instruction allowing Petitioner to be convicted of disseminating obscenity without requiring the jury to unanimously find at least one of the two magazines identified in the indictment to be obscene, violated the First and Fourteenth Amendments.

Petitioner contends that the trial judge should have instructed the jury that it had to unanimously find at least one of the two magazines identified in the indictment to be obscene, and could not convict if some of the jurors found the first magazine to be obscene while other jurors found the second magazine to be obscene. Petitioner asked the judge to give such a unanimity instruction but he declined the request, finding no material difference between the two magazines. (Tr. at 158, Vol. 3.)

The charge actually given by the trial judge included the following instruction:

> Material is patently offensive when taken as a whole it affronts contemporary community standards relating to the description or representation of sexual matters and the average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex.
>
> In determining whether certain material is obscene, you should consider the entire magazine or magazines as a whole and not part by part. You may also consider whether the predominant theme and purpose of the material, when viewed as a whole and not part-by-part, is an appeal to the prurient interest of the average adult person in your community, and applying the reasonable person standard you find that the material as a whole lacks serious literary, artistic, political or scientific value.

(Tr. at. 211-12, vol III.)

Petitioner contends that this instruction was constitutionally infirm. He argues that the obscenity test of *Miller v. California*, 413 U.S. 15 (1973) must be applied by the jury as to each magazine, i.e. each "work as a whole," that forms the basis of the prosecution, and only after a determination that a particular magazine is obscene can a jury then determine if the other elements of distributing the obscene material have been proven. This same argument was rejected by the North Carolina Court of Appeals. That court reasoned as follows:

Defendant first argues that the trial court erred in refusing to instruct the jury that there must be unanimous agreement that at least one of the two magazines purchased by Detective Gray was obscene. Defendant contends this refusal violates his right to a unanimous jury verdict because the instructions given permitted a conviction when "some but not all jurors thought one magazine was obscene while other jurors, but not all, thought the other magazine was obscene."

To support his argument, defendant cites *State v. Lyons*, 330 N.C. 298, 412 S.E.2d 308 (1991) and *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986). In those cases, our Supreme Court held that disjunctive instructions which allow the jury to find that the defendant had committed either of two separate crimes are fatally defective because ambiguous and uncertain jury verdicts result. *Lyons*, 330 N.C. at 306-07, 412 S.E.2d at 314; *Diaz*, 317 N.C. at 554, 346 S.E.2d at 494. We do not find these cases controlling. Instead, we conclude that the present case is governed by another line of cases beginning with *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990).

In *Hartness*, the defendant was charged with taking indecent liberties with a child. 326 N.C. at 562, 391 S.E.2d at 178. In instructing the jury, the trial court defined an indecent liberty as "an immoral, improper or indecent touching or act by the defendant upon the child, or an inducement by the defendant of an immoral or indecent touching

by the child." *Id.* at 563, 391 S.E.2d at 178. The defendant argued that the instruction allowed for a potentially nonunanimous jury verdict. *Id.* The Supreme Court, however, found no error in the instruction. *Id.* at 567, 391 S.E.2d at 181. Instead, it determined that even if some jurors found that the defendant committed one type of proscribed sexual conduct and others found that he committed another, "the fact remains that the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of 'any immoral, improper, or indecent liberties,'" which is what the statute prohibits. *Id.* at 565, 391 S.E.2d at 179.

Subsequently, our Supreme Court revisited this issue in *Lyons* and explained the difference in the two lines of cases:

> There is a critical difference between the lines of cases represented by Diaz and Hartness. The former line establishes that a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, either of which is in itself a separate offense, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense. The latter line establishes that if the trial court merely instructs the jury

> disjunctively as to various alternative acts which will establish an element of the offense, the requirement of unanimity is satisfied.

Lyons, 330 N.C. at 302-03, 412 S.E.2d at 312. While later analyzing the same issue, this Court concluded, "[T]he difference is whether the two underlying acts are separate offenses or whether they are merely alternative ways to establish a single offense." *State v. Almond*, 112 N.C. App. 137, 144, 435 S.E.2d 91, 96 (1993).

We hold that the present situation involves alternative methods of establishing a single offense and is therefore controlled by *Hartness*, G.S. § 14-190.1, does not contain separately punishable elements. It prohibits one single offense: "intentionally disseminat[ing] obscenity," G.S. § 14-190.1(a)(1993), which may be proved by evidence of any one of several acts.

The fact that the present sale involves two magazines does not transform defendant's crime into a multi-offense situation like in *Diaz* or *Lyons*. Under G.S. § 14-190.1, despite the number of obscene materials sold at one time, a defendant may not be convicted of more than one offense for each transaction. *State v. Smith*, 323 N.C. 439, 444, 373 S.E.2d 435, 438 (1988). We hold that the instructions provided did not violate defendant's right to a unanimous verdict.

123 N.C. App. at 296-97, 473 S.E.2d at 28-29.

This court considers the decision of the Court of Appeals to be a reasonable adjudication of Plaintiff's first contention, and therefore habeas relief cannot be granted. *See Green v. French*, 143 F.3d 864 (4th Cir. 1998) (habeas relief is authorized only when state court adjudicated federal constitutional claim in a manner that reasonable jurists would all agree is unreasonable). But, more to the point, the court considers it unnecessary to resolve the issue of whether the state court's jury instruction was erroneous because the instruction, even if erroneous, was clearly harmless error. *Cf. Satcher v. Pruett*, 126 F.3d 561, 567 (4th Cir. 1997) (unnecessary to determine if in-court identification was unreliable and inadmissible under due process clause because admission, if erroneous, was harmless).

It is well established that principles of comity, federalism, and finality prevent a federal habeas court from overturning a state court conviction unless the court finds that the alleged error "had substantial and injurious effect or influence in determining the . . . verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). In this case, it is clear that the error alleged by Petitioner did not, and could not, have substantially and injuriously influenced the jury's verdict that Petitioner was guilty of distributing obscene material. The state trial judge found as a fact that there was no material difference in content between the two magazines in issue insofar as the question of obscenity was concerned. Of course, this court must make a *de novo* examination of the whole record of the state court proceedings as a part of its harmless error inquiry. *Satcher*, 126 F.3d at 567. The court's review of the record, and in particular the two magazines in question, convinces the court beyond doubt that any error in the trial judge's instructions was harmless under the *Brecht* standard. There simply exists no material distinction between the two magazines that could have led the juror to distinguish between them under the obscenity test of *Miller v. California*.

Accordingly, Petitioner is entitled to no relief in habeas corpus under his first claim for relief.

Claim (2) - the trial judge's instructions to the jury violated Petitioner's First and Fourteenth Amendment rights because the judge erred in defining "a prurient interest in sex." The judge defined this term as "an unhealthy, abnormal, lascivious, shameful or morbid sexual interest." (Tr. 211, vol III.)

The North Carolina Court of Appeals rejected this contention. It reasoned as follows.

> Defendant next assigns error to several of the trial court's instructions to the jury. First, he contends that the trial court's definition of "prurient" was error. The court instructed: "A prurient interest in sex is an unhealthy, abnormal, lascivious, shameful or morbid sexual interest." Defendant argues that in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985), the United States Supreme Court prohibited states from defining "prurient interest" in terms of arousing lust. According to defendant, since "lascivious" means "lustful," the instruction is error. We find defendant's reading of *Brockett* flawed.
>
> The Washington statute at issue in *Brockett* defined "prurient" as "'that which incites lasciviousness or lust.'" *Brockett*, 472 U.S. at 494, 105 S.Ct. at 2797, 86 L.Ed.2d at 399 The Supreme Court invalidated the statute only in so far as "'lust" was taken to include a normal interest in sex. *Id.* at 504-05, 105 S.Ct. at 2802, 86 L.Ed.2d at 406. However, the Court did recognized that "prurience may be constitutionally defined for

> the purposes of identifying obscenity as that which appeals to a shameful or morbid interest in sex." *Id.* at 504-05, 105 S.Ct. at 2802, 86 L.Ed.2d at 406 (citing *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957)).
>
> Therefore, contrary to defendant's argument, the Supreme Court did not proscribe the use of "lust" in obscenity definitions. Rather, it disallowed any definition which could be read to include a normal, healthy sexual interest. Clearly, the above instruction which also includes the terms "unhealthy," "abnormal," "shameful" and "morbid" could not be understood by any jury to include a normal interest in sex. Defendant's assignment of error is overruled.

123 N.C. at 299-300, 473 S.E.2d at 30.

Petitioner's second claim was adjudicated in federal constitutional terms by the North Carolina Court of Appeals. Its opinion on this point is persuasive and obviously a reasonable adjudication of Petitioner's claim of error. Even if the court were to assume error for purposes of argument, it is utterly clear that any error was harmless under the *Brecht* standard. The jury could not have been misled or confused into believing that the term "prurient interest" as defined by the trial judge could include a normal, healthy interest in sex.

Claim (3) - the trial court committed First Amendment error by requiring as a condition of probation that Petitioner not work or be employed in a retail establishment that sells sexually explicit material.

This contention was raised and adjudicated by the North Carolina Court of Appeals in its published opinion. *State v. Johnston*, 473 S.E.2d at 33. That court determined that under state law, the judge did not err in fashioning a condition of probation that was related to the offense of

conviction and was, in the judge's discretion, reasonably related to rehabilitation of the defendant. Petitioner contends that the condition of probation is overbroad because it prohibits work in an establishment that sells "sexually explicit material," and not just obscene material.

The court must reject Petitioner's argument. Unquestionably the limitation on Petitioner's employment opportunities during the period of probation is broader than that circumscribed by the obscenity laws. Nonetheless, Petitioner had been convicted of an obscenity offense. The trial judge did not commit constitutional error in sentencing Petitioner to probation conditions that could reasonable serve to rehabilitate Petitioner. Petitioner has shown no authority to the contrary, and the court is aware of none.

Conclusion

For reasons set forth above, **IT IS ORDERED** that Petitioner's request for a writ of habeas corpus is **DENIED**, and the State's motion for summary judgment [Pl. No. 5] is **GRANTED**. A separate judgment will be entered dismissing this action with prejudice. A certificate of appealabilty is not entered, the court finding that no substantial constitutional question is presented.

/s/ P. Trevor Sharp
P. Trevor Sharp, U.S. Magistrate Judge

September 2, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA

ROBERT CHARLES JOHNSTON,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

1:97CV01216

Entered: September 2, 1998

J-U-D-G-M-E-N-T

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment,

IT IS HEREBY ORDERED AND ADJUDGED that this action be, and the same hereby is dismissed with prejudice and without the assessment of costs. A certificate of appealability is not issued, the court finding that no substantial issue is presented.

/s/ P. Trevor Sharp
P. Trevor Sharp, U.S. Magistrate Judge

September 2, 1998